BANDAR UTAMA DEVELOPMENT SDN BHD & ANOR
v. BANDAR UTAMA 1 JMB

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
ABDUL RAHMAN SEBLI JCA
MARY LIM JCA
[CIVIL APPEAL NO: B-02(A)-1303-07-2017]
26 JUNE 2018

CIVIL PROCEDURE: *Discovery – Pre-action discovery – Application for – Difference between pre-action discovery and pre-trial discovery – Whether considered by trial judge – Equitable remedy – Alternative action available – Whether abuse of process to seek for pre-action discovery order – Whether application should have been made against third parties and not contracting parties or parties who have contractual nexus by contract or statute – Rules of Court 2012, O. 24 r. 7A*

The appellants were the developer and land owner of a residential development. The respondent was a joint management body and its members consisted of purchasers of condominium units. The respondent complained that the appellants breached the sale and purchase agreement by failing, refusing and/or neglecting to deliver the strata titles despite it being ten years since delivery of vacant possession of the units. At the High Court, the trial judge allowed the respondent's application for pre-action discovery which was filed pursuant to O. 24 r. 7A of the Rules of Court 2012 ('ROC'). In the present appeal, the appellants argued, *inter alia,* that the trial judge erred, in law and in fact, for having failed to consider that (i) the respondent ought to have exhausted all available remedies under the Strata Management Act 2013 before filing the originating summons at the High Court; (ii) there were available alternative avenues and sources for the respondent to procure the information and documents sought and applied for; and (iii) O. 24 r. 7A(3) of the ROC is really to assist a prospective litigant plaintiff to determine whether he has a viable claim against the intended defendant. It was also argued that the trial judge erred, in law and in fact, in failing to appreciate the difference between a pre-action discovery and a pre-trial discovery by not considering and appreciating that the documents sought and applied for would only be for the sole purpose of supporting an established cause of action against identified parties and not to assist and/or aid the respondent to identify the parties and assist to establish a cause of action.

Held (allowing appeal with costs)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) The jurisprudence related to pre-trial discovery and pre-action discovery is not one and the same even though both are placed in O. 24 of the ROC. Pre-action discovery is not related to contractual parties but it is

addressed to third parties who may be tortfeasors, or parties who are necessary for the purported plaintiff to succeed in a claim or a potential party to be the defendant. As a general rule, pre-action discovery could relate to a proposed cause of action as well as relief. The threshold test to satisfy an order for pre-action discovery under O. 24 r. 7A is extremely high in contrast to common law right, as the rules sets out specific requirements and the court must exercise its power with caution and circumspect. (paras 10 & 12)

(2) The principle enunciated in *Norwich Pharmacal Company v. Customs and Excise Commissioners* (*'Norwich')* was adopted and approved in *First Malaysia Finance Bhd v. Dato' Mohd Fathi HA* where it was held that the general rule, as laid in *Norwich* case, is that discovery to find the identity of the wrongdoer is available against anyone against whom the plaintiff has cause of action in relation to the same wrong. To this general rule, there is an exception that if, through no fault of his own, a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing, whilst he may incur no personal liability, he is under a legal duty to assist the person who had been wronged by giving him full information and in making disclosure of the identity of the wrongdoers. (para 15)

(3) An application under O. 24 r. 7A of the ROC has many riders in addition to what needs to be satisfied under the *Norwich* principle. In addition, the right of discovery under the rules could not be equated to a procedural right. It would still fall under the *Norwich Pharmacal* order which is stated as an equitable remedy. Being an equitable remedy, it would not be granted as of right. It is trite that those who seek equitable remedy is required to come with clean hands. If there is an alternative remedy available, then that must be resorted or if an action could be filed without pre-action discovery, it ought to be filed and subsequently discovery orders should be obtained through a normal process. (para16)

(4) Courts, through their judgment, should not open the door to pre-action discovery when an identifiable cause of action has arisen. For instance, if the claim is for contractual breach or for a tort like normal road accident cases, an action ought to be filed first and thereafter, discovery order should be sought. In such cases, it will be an abuse of process to approach the court by pre-action discovery application. In the circumstances, O. 25 r. 7A(5) must be strictly construed by the court to ensure that the equitable remedy is not abused. In addition, there must be real material before the court to grant the order. It could not be based on evidence lacking credibility or surmise or conjecture, *etc*. (paras 16 & 17)

(5) Order 24 is 'fact centric'. Pure reliance of cases within and outside the jurisdiction as a general rule will not tie the hands of the court in the exercise of its discretionary powers. The test whether or not to grant an order is set out in O. 24 r. 8. In essence, the court is not required to lean towards the applicant unless the applicant has made out a strong case for the equitable relief to be granted and the respondent has not been able to credibly deny the applicant's assertion or satisfy the court that alternative relief is or are open to the applicant. (paras 18 & 19)

(6) There was an alternative action available to the respondent. It would be an abuse of process for the respondent to seek for pre-action discovery order. The trial court failed to consider the salient object and legal history related to pre-action discovery order under O. 24 r. 7A which is a new invent of the ROC, substantially based on the jurisprudence advocated in the *Norwich'*s case and many other cases inclusive of cases in Malaysia. In almost all of these cases, the golden thread was that the application was made against third parties and not contracting parties or parties who have contractual nexus by contract or statute. (para 20)

(7) The trial judge failed to consider the test provided in O. 24 r. 8 in the proper perspective, taking into consideration the factual matrix of the case and statutory law as a whole, thereby compromising the integrity of the decision-making process. Once the integrity of the decision-making process has been compromised, the appellate court has no option but to intervene in the discretionary power of the trial court to make just order as the case warrants. (para 20)

Bahasa Malaysia *Headnotes*

Perayu-perayu adalah pemaju dan pemilik tanah satu pembangunan kediaman. Responden ialah badan pengurusan bersama dan ahli-ahlinya adalah pembeli-pembeli unit kondominium. Responden mengadu bahawa perayu-perayu melanggar perjanjian jual beli kerana gagal, enggan dan/atau cuai menyerahkan hak milik-hak milik strata walaupun sudah sepuluh tahun sejak penyerahan milikan kosong unit-unit tersebut. Di Mahkamah Tinggi, hakim bicara membenarkan permohonan responden untuk penzahiran pra-tindakan yang difailkan bawah A. 24 k. 7A Kaedah-kaedah Mahkamah 2012 ('KKM'). Dalam rayuan ini, perayu-perayu menghujahkan, antara lain, hakim bicara terkhilaf, bawah undang-undang dan berdasarkan fakta, kerana gagal mempertimbangkan (i) responden sepatutnya mengguna pakai semua remedi sedia ada, bawah Akta Pengurusan Strata 2013, sebelum memfailkan saman pemula di Mahkamah Tinggi; (ii) terdapat cara-cara dan sumber-sumber alternatif untuk responden mendapatkan maklumat dan dokumen-dokumen yang diminta atau dipohon; dan (iii) A. 24 k. 7A(3) KKM sebenarnya bertujuan membantu bakal litigan plaintif menentukan sama ada dia mempunyai tuntutan yang boleh berjaya terhadap defendan yang

diniatkan. Dihujahkan juga bahawa hakim bicara terkhilaf, bawah undang-undang dan fakta, kerana gagal mempertimbangkan perbezaan antara penzahiran pra-tindakan dan penzahiran pra-perbicaraan kerana tidak mengambil kira dan mempertimbangkan bahawa dokumen-dokumen yang diminta dan dipohon hanya untuk tujuan menyokong kausa tindakan yang terhadap pihak-pihak yang tidak dikenal pasti dan bukan untuk membantu dan/atau menolong responden mengenal pasti pihak-pihak dan membantu mewujudkan satu kausa tindakan.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Jurisprudens berkaitan penzahiran pra-perbicaraan dan penzahiran pra-tindakan bukan sama walaupun kedua-duanya dinyatakan dalam A. 24 KKM. Penzahiran pra-tindakan tidak berkaitan dengan pihak-pihak berkontrak tetapi ditujukan pada pihak-pihak ketiga yang mungkin pelaku tort atau pihak-pihak yang perlu agar bakal plaintif berjaya dalam satu tindakan atau pihak yang berpotensi menjadi defendan. Sebagai peraturan am, penzahiran pra-tindakan boleh berkait dengan kausa tindakan yang dicadangkan dan juga relief. Ujian ambang mesti memenuhi satu perintah untuk penzahiran pra-tindakan bawah A. 24 k. 7A juga amat tinggi berbanding hak common law, kerana peraturan-peraturannya menetapkan syarat-syarat khusus dan mahkamah mesti menjalankan kuasanya dengan berwaspada dan berhati-hati.

(2) Prinsip yang dinyatakan dalam *Norwich Pharmacal Company v. Customs and Excise Commissioners* ('*Norwich*') diguna pakai dan dibenarkan dalam *First Malaysia Finance Bhd v. Dato' Mohd Fathi HA* yang memutuskan, peraturan am, seperti yang dinyatakan dalam kes *Norwich*, ialah penzahiran mencari identiti pelaku salah buat siapa-siapa yang plaintif ada kausa tindakan terhadapnya berkaitan kesalahan sama. Terdapat pengecualian terhadap peraturan am ini iaitu jika, tanpa kesalahannya sendiri, seseorang yang terbabit dengan tindakan tort orang lain, hingga membantu pelakuan salah mereka, walaupun dia tidak mempunyai liabiliti peribadi, mempunyai kewajipan undang-undang membantu orang yang disalahi dengan memberinya maklumat penuh dan dalam membuat pendedahan identiti pelaku-pelaku salah tersebut.

(3) Satu permohonan bawah A. 24 k. 7A mempunyai banyak peruntukan tambahan, sebagai tambahan pada apa-apa yang perlu dipenuhi bawah prinsip *Norwich*. Tambahan lagi, hak penzahiran bawah peraturan tersebut tidak boleh disamakan dengan hak tatacara. Ini masih akan terangkum bawah perintah *Norwich* yang dinyatakan mempunyai remedi berekuiti. Sebagai remedi berekuiti, mereka tidak akan diberikan hak. Adalah matan bahawa mereka yang memohon remedi berekuti perlu

hadir dengan 'clean hands'. Jika terdapat remedi alternatif sedia ada, ini mesti dirujuk atau jika tindakan boleh difailkan tanpa penzahiran pra-tindakan, ini mesti difailkan dan susulan itu, perintah-perintah penzahiran boleh diperoleh melalui proses biasa.

(4) Mahkamah-mahkamah, melalui penghakiman mereka, tidak sepatutnya membuka pintu buat penzahiran pra-tindakan sedangkan kausa tindakan yang sudah dikenal pasti telah timbul. Contohnya, jika tuntutan untuk pelanggaran kontraktual atau tort, seperti kes-kes kemalangan jalan raya, satu tindakan harus difailkan dan selepas itu, perintah penzahiran harus dipohon. Dalam kes-kes sedemikian, akan menjadi salah guna proses untuk hadir ke mahkamah melalui permohonan penzahiran pra-tindakan. Dalam hal-hal keadaan tersebut, A. 25 k. 7A(5) mesti ditafsir dengan ketat oleh mahkamah untuk memastikan remedi berekuiti tidak disalah guna. Tambahan lagi, mesti terdapat material sebenar sebelum mahkamah membenarkan perintah. Ini tidak boleh berdasarkan keterangan yang tidak mempunyai kredibiliti atau tekaan atau tebakan.

(5) Aturan 24 berkisar pada fakta. Pergantungan sepenuhnya pada kes-kes dalam dan luar bidang kuasa, sebagai satu peraturan am, tidak akan mengikat tangan mahkamah dalam menjalankan kuasa-kuasa budi bicaranya. Ujian sama atau tidak untuk memberi perintah dinyatakan dalam A. 24 k. 8. Pada dasarnya, mahkamah tidak perlu condong ke arah pemohon kecuali pemohon telah membuktikan kes yang kukuh untuk relief berekuiti diberikan dan responden tidak boleh, secara kredibel, menafikan dalihan pemohon atau memuaskan mahkamah bahawa relief alternatif terbuka buat pemohon.

(6) Tindakan alternatif tersedia buat responden. Menjadi salah guna proses jika responden memohon perintah penzahiran pra-tindakan. Mahkamah bicara gagal mempertimbangkan objek dan sejarah perundangan yang menonjol berkaitan perintah penzahiran pra-tindakan bawah A. 24 k. 7A, iaitu rekaan baharu KKM, sebahagian besarnya berdasarkan jurisprudens yang diutarakan dalam kes *Norwich* dan banyak lagi kes-kes lain termasuk kes di Malaysia. Dalam hampir semua kes ini, persamaannya ialah permohonan dibuat terhadap pihak-pihak ketiga dan bukan pihak berkontrak atau pihak-pihak yang mempunyai kaitan melalui kontrak atau statut.

(7) Hakim bicara gagal mempertimbangkan ujian dalam A. 24 k. 8 dalam perspektif teratur, mempertimbangkan rentetan fakta kes dan undang-undang statutori secara keseluruhannya, lalu menjejaskan integriti proses membuat keputusan. Apabila proses membuat keputusan terjejas, mahkamah rayuan tidak mempunyai pilihan selain campur tangan dalam kuasa budi bicara mahkamah bicara untuk membuat perintah yang adil seperti yang dibenarkan oleh kes tersebut.

Case(s) referred to:

Ahmad Zahri Mirza v. Pricewaterhouse-Coopers Capital Sdn Bhd & Ors [2015] 7 CLJ 930 HC ***(refd)***

Anglo Irish Bank Corporation plc v. West LB AG [2009] EWHC 207 ***(refd)***

Avanes v. Marshall & Ors [2007] NSWSC 191 ***(refd)***

Bayerische Hypo-und Vereinsbank AG v. Asia Pacific Breweries (Singapore) Pte Ltd [2004] 4 SLR (R) 39 ***(refd)***

Beckkett Pte Ltd v. Deutsche Bank AG Singapore Branch [2003] 1 SLR (R) 321 ***(refd)***

Breakspear & Others v. Ackland & Another [2009] Ch 32 ***(refd)***

British Steel Corporation v. Granada Television Limited [1980] 3 WLR 774 ***(refd)***

Ching Mun Fong v. Standard Chartered Bank [2012] 2 SLR 22 ***(refd)***

Clarke v. Earl of Ormonde [1821] Jac 108 ***(refd)***

Compagnie Financiere du Pacifique v. Peruvian Guano Co [1882] 11 QBD 55 ***(refd)***

Dorsey James Michael v. World Sport Group Pte Ltd [2014] 2 SLR 208 ***(refd)***

Dunning v. Board of Governors of the United Liverpool Hospitals [1973] 2 All ER 454 ***(refd)***

ECM Libra Investment Bank Bhd v. Foo Ai Meng & Ors [2013] 1 LNS 99 CA ***(refd)***

Faber Merlin Malaysia Bhd v. Ban Guan Sdn Bhd [1980] 1 LNS 189 FC ***(refd)***

First Malaysia Finance Bhd v. Dato' Mohd Fathi Ahmad [1993] 3 CLJ 329 SC ***(refd)***

Hartigan Nominees Ptv Ltd v. Rydge [1992] 29 NSWLR 405 ***(refd)***

Infoline Sdn Bhd v. Benjamin Lim Keong Hoe [2017] 8 CLJ 554 CA ***(refd)***

Kerajaan Negeri Kelantan v. Petroliam Nasional Bhd & Other Appeals [2014] 7 CLJ 597 FC ***(refd)***

Kneale v. Barclays Bank plc (trading as Barclaycard) [2010] EWHC 207 ***(refd)***

Kuah Kok Kim v. Ernst & Young (a firm) [1996] 3 SLR (R) 485 ***(refd)***

Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2013] 3 CLJ 813 CA ***(refd)***

Loose v. Williamson [1978] WLR 639 ***(refd)***

Marius Schreuders v. Grandiflora Nominees Pty Ltd [2014] VSC 310 ***(refd)***

Millar & Another v. Hornsby & Others [2000] 3 ITELR 81 ***(refd)***

Ng Giok Oh v. Sajjad Akhtar [2003] I SLR (R) 375 ***(refd)***

Norwich Pharmacal Company v. Customs and Excise Commissioners [1973] 3 WLR 164 ***(refd)***

O'Rourke v. Darbishire & Others [1920] AC 581 ***(refd)***

Re Cowin v. Gravett [1886] 33 Ch 179 ***(refd)***

Re Londonderry's Settlement [1964] 3 All ER 855 ***(refd)***

Re the Internine Trust and the Intertraders Trust; Sheikh Abdullah Ali M Alhamrani v. Russa Management Ltd & Others [2004] JCA 158 ***(refd)***

Re Tillot, Lee v. Wilson [1892] 1 Ch 86 ***(refd)***

Rouse & Others v. IOOF Australia Trustees Limited [1999] 2 ITELR 289 ***(refd)***

Sandra Stuart Curven & Ors v. Vanbreck Pty Ltd (as Trustee for the WS and NR Harvey Family Trust) [2009] VSC A 284 ***(refd)***

Schmidt v. Rosewood Trust Ltd [2003] 2 AC 709 ***(refd)***

Surface Stone Pte Ltd v. Tay Seng Leon and Another [2011] SGHC 223 ***(refd)***

Yekambaran Marimuthu v. Malayawata Steel Bhd [1994] 2 CLJ 581 HC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 24 rr. 7A(5), 8
Rules of the High Court 1980, O. 24 rr. 1(1), 3(1)
Strata Management Act 2013, s. 105(1), Fourth Schedule Part 1 cl. 12

Other source(s) referred to:
Janab's Key To Civil Procedure, 5th edn, pp 209, 210

For the appellants - Max Yong & S Malar; M/s Shui Tai
For the respondent - Alvin Julian & Tunku Munawwir; M/s Wong Teh & Assocs

[Editor's note: For the High Court judgment, please see Bandar Utama 1 JMB lwn. Bandar Utama Development Sdn Bhd & Satu Lagi [2017] 1 LNS 1341 (overruled).]

Reported by Kumitha Abd Majid

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellants appealed against the decision of the learned High Court Judge who had allowed the respondent's application for pre-action discovery pursuant to O. 24 r. 7A of the Rules of Court 2012 (RC 2012).

[2] Both parties among other cases had relied on the Court of Appeal's case of *Infoline Sdn Bhd v. Benjamin Lim Keong Hoe* [2017] 8 CLJ 554; [2017] 4 MLRA 203, a judgment of Her Ladyship Dato' Mary Lim Thiam Suan who is also a panel member of this coram. The judgment extensively deals with the new provision of the Rules namely O. 24 r. 7A which was introduced and discussed in quite a number of cases from other jurisdictions. Those cases give multifold ideas, views and opinions on how to exercise a discretion vested in the court and court alone. The articulate discussion of the relevant cases in our view will stand as some form of guidance for the trial courts to be guided when dealing with O. 24 r. 7A of RC 2012. To appreciate our judgment and to avoid repetition of the cases related to O. 24 r. 7A, the judgment of Her Ladyship must be read together with this judgment.

[3] It is trite that an appellate court will be slow in intervening in the discretionary exercise of the trial court. (See *Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2013] 3 CLJ 813; [2013] 2 MLJ 650; *ECM Libra Investment Bank Bhd v. Foo Ai Meng & Ors* [2013] 1 LNS 99; [2013] 3 MLJ 35). In the instant case, we find that the jurisprudence advocated by the trial court to grant the order was jurisprudentially flawed and in consequence we had no other alternative but to allow the appeal *in limine*.

[4] The major jurisprudential flaw on the face of record was the failure of the learned judge to appreciate that O. 24 r. 7A has nothing to do with contracting parties unless the rare exception applies. We will elaborate further on this issue in the judgment.

A **Brief Facts**

[5] The appellants are developer and land owner of residential development. The respondent is the joint management body pursuant to the Building and Consumer Properties Act 2007. The respondent's members as usual consist of purchasers of the condominium units; and some of the units
B are also owned by the appellants.

[6] The complaint of the respondent is principally related to contractual breach of the sale and purchase agreements with the purchaser of the units of the appellants, that notwithstanding ten years have elapsed since the delivery of vacant possession of the condominium and the appellants (the
C first appellant in particular) have failed, refused and/or neglected to deliver the requisite strata titles.

[7] It is one of the arguments of the appellants that any issue in the particular case related to strata title must be referred to the Strata
D Management Tribunal pursuant to s. 105(1) of the Strata Management Act 2013 (SMA 2013) as well as the Fourth Schedule, in particular, cl. 12. The said s. 105 and the Fourth Schedule read as follows:

105. Jurisdiction of Tribunal

E (1) The Tribunal shall have the jurisdiction to hear and determine any claims specified in Part 1 of the Fourth Schedule and where the total amount in respect of which an award of the Tribunal is sought does not exceed two hundred and fifty thousand ringgit or such other amount as may be prescribed to substitute the total amount.

F (2) For the avoidance of doubt, the Limitation Act 1953 [Act 254] shall not apply to the proceedings of the Tribunal.

(3) The jurisdiction of the Tribunal shall not extend to any claim in which the title to any land, or any estate or interest in land, or any franchise, is in question.

G **Fourth Schedule**

Part 1

Jurisdiction of the Tribunal

[Subsection 105(1)]

H 1. A dispute or complaint concerning an exercise or the performance of, or the failure to exercise or perform, a function, duty or power conferred or imposed by this Act the subsidiary legislation made under this Act, except for those specifically provided for in this Part.

I 2. Subject to subsection 16N(2) of the Housing Development (Control and Licensing) Act 1966 [Act 118], a dispute on costs or repairs in respect of a defect in a parcel, building or land intended for subdivision into parcels, or subdivided building or land, and its common property or limited common property.

3. A claim for the recovery of Charges, or contribution to the sinking fund, or any amount which is declared by the provisions of this Act as a debt.
4. A claim for an order to convene a general meeting.
5. A claim for an order to invalidate proceedings of meeting where any provision of the Act has been contravened.
6. A claim for an order to nullify a resolution where voting rights has been denied or where due notice has not been given.
7. A claim for an order to nullify a resolution passed at a general meeting.
8. A claim for an order to revoke amendment of by-laws having regard to the interests of all the parcel owners or proprietors.
9. A claim for an order to vary the rate of interest fixed by the joint management body, management corporation or subsidiary management corporation for late payment of Charges, or contribution to the sinking fund.
10. A claim for an order to vary the amount of insurance to be provided.
11. A claim for an order to pursue an insurance claim.
12. A claim for compelling a developer, joint management body, management corporation or subsidiary management corporation to supply information or documents.
13. A claim for an order to give consent to effect alterations to any common property or limited common property.
14. A claim for an order to affirm, vary or revoke Commissioner's decision.

[8] The memorandum of appeal of the appellants sets out the grievance of the appellants and *inter alia* reads as follows:

1. The learned Judge erred in law and in fact when she allowed the Respondent's Saman Pemula dated 19.9.2016 by having failed to consider that the Respondents ought to have exhausted available remedies under the Strata Management Act 2013 before filing the Saman Pemula dated 19-09-2016.
2. The learned Judge erred in law and in fact when she failed to consider that there were available alternative avenues and sources for the Respondent to procure and obtain the information and documents sought and applied for.
3. The learned Judge erred in law and in fact when she failed to consider that Respondent had written and applied for the same information and documents to relevant authorities.

4. The learned Judge erred in law and in fact when she failed to consider that Order 24 rule 7A(3) of the Rules of Court 2012 is really to assist a prospective litigant plaintiff to determine whether he has a viable claim against the intended defendant.

5. The learned Judge erred in law and in fact when she failed to address, consider and/or inquire whether the Appellants in the instant appeal, has in their possession, custody or power of the documents sought to be discovered.

6. The learned Judge erred in law and fact when she failed to address, consider and/or inquire whether the documents sought are relevant to an issue arising or likely to arise in the intended proceedings.

7. The learned Judge erred in law and in fact when she failed to consider that the Respondent had already identified the parties and the cause of action in their affidavits in a Pre-Action discovery under Order 24 Rule 7A Rules of Court 2012 henceforth should have made a Pre-Trial discovery instead of under Order 24 Rule 7A Rules of Court 2012.

8. The learned Judge erred in law and in fact she failed to appreciate the difference between a Pre-Action discovery and a Pre-Trial discovery by not considering and appreciating that the documents sought and applied for will only be for the sole purpose of supporting an established cause of action against identified parties and not to assist and/or aid the Respondent to identify the parties and help establish a cause of action.

9. The learned Judge erred in law and fact she failed to appreciate the Respondent was in a position to commence proceedings and had already decided that they have a cause of action against the Appellants and the documents and discovery applied for was not to help ascertain whether they have a viable cause of action but more to substantiate their cause of action in evidence therefore only evidential in value.

10. This Memorandum of Appeal is prepared without the benefit of the written Grounds of Judgment of the learned Judge and Notes of Evidence. In the premises, the Appellants reserve their right to add further or other grounds of appeal upon having received and studied the judgment of the learned Judge.

[9] The respondent's originating summons prayers read as follows:

(A) that the Defendants deliver to the Plaintiff or the Plaintiff's solicitors, within 14 days commencing from the date of the Order to be made herein, an Affidavit verifying whether the following documents are in the possession, custody or power of the Defendants:

(i) all correspondence (hereinafter referred to as the "Correspondence") between the Defendants and the Pendaftar Tanah & Galian, Selangor relating to the application for Strata Title for the individual parcels of the Condominium situated at the residential development known as Bandar Utama 1, Bandar Utama, Petaling Jaya Phase 1;

(ii) the original Development Order (hereinafter referred to as the "Development Order") that was approved by MAJLIS BANDARAYA PETALING JAYA for the residential development known as Bandar Utama 1, Bandar Utama, Petaling Jaya Phase 1;

(iii) any Amended Development Order (hereinafter referred to as the "Amended Development Order") that was approved by MAJLIS BANDARAYA PETALING JAYA for the residential development known as Bandar Utama 1, Bandar Utama, Petaling Jaya Phase 1;

(iv) the Lease (hereinafter referred to as the "Lease") by which the Second Defendant, as the lessor, leased part of the land held under title bearing particulars Geran 42995, Lot 27671, Seksyen 39, Bandar Petaling Jaya, Daerah Petaling, Negeri Selangor *vide* Presentation Number 100323/2005 dated 27.12.2005 to FIRST NATIONWIDE NETWORK SDN BHD (299093-U), as the lessee; and

(v) the original building plans (hereinafter referred to as the "Building Plans") that was approved by MAJLIS BANDARAYA PETALING JAYA for the residential development known as Bandar Utama 1, Bandar Utama, Petaling Jaya Phase 1 together with any amendments to the Building Plans (if any).

(B) that the Defendants do produce and provide a copy each of the documents stated in prayer (A) (i) to (A) (v) above that are in the Defendants possession, custody or power to the Plaintiff within 14 days commencing from the date of the Order to be made herein;

(C) costs of this Application to be borne by the Defendants; and

(D) such further and/or other relief as this Honourable Court deems fit and proper.

Jurisprudence Related To Discovery And Pre-action Discovery

[10] The jurisprudence related to discovery and pre-action discovery is not one and the same even though both are placed in O. 24 of RC 2012.

[11] As a general rule, discovery is related to parties to the action. Discovery under this head generally has nothing to do with cause of action but is related to relief if the applicant is the plaintiff and to deny liability or quantum if the applicant is the defendant. The threshold test to satisfy the court to obtain an order for discovery is low in contrast to pre-action discovery. The threshold test for discovery by itself is high and was explained in a number of cases. To name a few are as follows:

(a) In *Yekambaran Marimuthu v. Malayawata Steel Berhad* [1994] 2 CLJ 581, the Supreme Court set out the threshold test the applicant had to satisfy to succeed in an application for discovery. The court held: "(i) the essential elements for an order for discovery are threefold; namely, first there must be a "document", secondly, the document must be "relevant" and thirdly, the document must be or have been in the "possession, custody or power" of the party against whom the order for

discovery is sought; (ii) the documents sought must be relevant and/or related to the factual issues in dispute; (iii) as to "relevance", our Rules of the High Court limit discovery to documents which are "relevant to" or "relate" to the factual issues in dispute; (iv) more particularly, the discovery obligation applies to documents "relating to matters in question in the action" (Rules of the High Court 1980 O. 24 r. 1(1)] or "relating to any matter in question in the cause or matter" (O. 24 r. 3(1)); (v) in practice, the relevance is primarily determined by reference to the pleadings but there need not be a pleading for a matter to be said to be in issue."

(b) What amounts to relevance was discussed in *Surface Stone Pte Ltd v. Tay Seng Leon and Another* [2011] SGHC 223, in reliance of the case of *Compagnie Financiere du Pacifique v. Peruvian Guano Co* [1882] 11 QBD 55, where the court said: "It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly", because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences ..."

(c) As a general rule, discovery orders will not be granted if it is not relevant to the core issues. In *Kerajaan Negeri Kelantan v. Petroliam Nasional Berhad & Other Appeals* [2014] 7 CLJ 597, the Federal Court held: "(a) As for the discovery issue in the first appeal, the documents sought were not only very extensive, but irrelevant to the core issue. The documents sought only relate to the issue of quantum of damages and went nowhere towards establishing the issue of liability in the case. In the circumstances, in view of the O. 14A applications herein, the learned judge was correct in holding that discovery was not necessary at that stage of the proceedings. The learned judge's decision in dismissing discovery at that stage of proceedings was in line with the underlying principle under O. 24 r. 4 which underscored that the discovery process was predicated on the issues involved in a particular case. It followed that, in this case, the determination of the core issue in the O. 14A applications had rightly been decided to precede the discovery. It followed further that the exercise of discretion by the learned judge in the matter was in accordance with principles which did not justify this court's interference."

[12] Pre-action discovery is not related to contractual parties but it is addressed to third parties who may be tortfeasors, etc or parties who are necessary for the purported plaintiff to succeed in a claim or a potential party to be the defendant. As a general rule, pre-action discovery can relate to proposed cause of action as well as relief. The threshold test to satisfy an order for pre-action discovery at common law was high in contrast to application for discovery in an action. The threshold test to satisfy an order for pre-action discovery under O. 24 r. 7A is extremely high in contrast to common law right, as the Rules sets out specific requirements and the court must exercise its power with caution and circumspect. It is a power which must be exercised in a genuine case and not for the purpose of annoying a third party or in cases related to fishing expedition, etc.

[13] The common law position for pre-action discovery was explained in great detail by House of Lords in *Norwich Pharmacal Company v. Customs and Excise Commissioners* [1973] 3 WLR 164. A part of the judgment is reproduced here to appreciate the intricate jurisprudence. The said part reads as follows:

> My noble and learned friends, Lord Cross of Chelsea and Lord Kilbrandon, have dealt with the authorities. They are not very satisfactory, not always easy to reconcile and in the end inconclusive. On the whole I think they favour the appellants, and I am particularly impressed by the views expressed by Lord Romilly M.R. and Lord Hatherley LC in *Upmann v. Elkan* [1871] LR 12 Eq. 140; 7 Ch. App. 130. They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should cooperate in righting the wrong if he unwittingly facilitated its perpetration.
>
> I am more inclined to reach this result because it is clear that if the person mixed up in the affair has to any extent incurred any liability to the person wronged he must make full disclosure even though the person wronged has no intention of proceeding against him. It would I think be quite illogical to make his obligation to disclose the identity of the real offenders depend on whether or not he has himself incurred some minor liability. I would therefore hold that the respondents must disclose the information now sought unless there is some consideration of public policy which prevents that.

A Apart from public policy the respondents say that they are prevented by law from making this disclosure. I agree with your Lordships that is not so. If it were they could not even disclose such information in a serious criminal case, but their counsel were, quite rightly, not prepared to press their argument so far as that.

B So we have to weigh the requirements of justice to the appellants against the consideration put forward by the respondents as justifying nondisclosure. They are twofold. First it is said that to make such disclosures would or might impair or hamper the efficient conduct of their important statutory duties. And secondly it is said that such disclosure would or might be prejudicial to those whose identity would be disclosed.

C There is nothing secret or confidential in the information sought or in the documents which came into the hands of the respondents containing that information. Those documents are ordinary commercial documents which pass through many different hands. But it is said that those who do not wish to have their names disclosed might concoct false documents and thereby hamper the work of the customs. That would require at least a D conspiracy between the foreign consignor and the importer and it seems to me to be in the highest degree improbable. It appears that there are already arrangements in operation by the respondents restricting the disclosure of certain matters if the importers do not wish them to be disclosed. It may be that the knowledge that a court might order discovery in certain cases would cause somewhat greater use to be made of these E arrangements. But it was not suggested in argument that is a matter of any vital importance. The only other point was that such disclosure might cause resentment and impair good relations with other traders; but I find it impossible to believe that honest traders would resent failure to protect wrongdoers.

F Protection of traders from having their names disclosed is a more difficult matter. If we could be sure that those whose names are sought are all tortfeasor, they do not deserve any protection. In the present case the possibility that any are not is so remote that I think it can be neglected. The only possible way in which any of these imports could be legitimate G and not an infringement would seem to be that someone might have exported some furazolidone from this country and then whoever owned it abroad might have sent it back here. Then there would be no infringement. But again that seems most unlikely.

But there may be other cases where there is much more doubt. The validity of the patent may be doubtful and there could well be other H doubts. If the respondents have any doubts in any future case about the propriety of making disclosures they are well entitled to require the matter to be submitted to the court at the expense of the person seeking the disclosure. The court will then only order discovery if satisfied that there is no substantial chance of injustice being done.

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[14] In the *Norwich* case, the House of Lords stated that where a person, *albeit* innocently and without incurring any personal liability, became involved in the tortious acts of others, he came under a duty to assist one injured by those acts by giving him full information by way of discovery and disclosing the identity of the wrongdoers, and for that purpose it mattered not that such involvement was the result of voluntary action or the consequence of the performance of a statutory duty or otherwise; and that, accordingly, *prima facie* the respondents were under a duty to disclose the information sought. In this case, the court held that a party could bring a specific action by writ against a person for discovery in the name of a potential defendant if that person has facilitated the wrongdoing of the potential defendant and has the necessary information. The *Norwich* rule was applied in *Loose v. Williamson* [1978] WLR 639 and *British Steel Corporation v. Granada Television Limited* [1980] 3 WLR 774.

[15] The principles enunciated in *Norwich* case was adopted and approved in *First Malaysia Finance Berhad v. Dato' Mohd Fathi Ahmad* [1993] 3 CLJ 329; [1993] 2 MLJ 497. In this case, it was held that the general rule as laid down in the *Norwich* case is that discovery to find the identity of the wrongdoer is available against anyone against whom the plaintiff has a cause of action in relation to the same wrong. To this general rule, there is an exception that if, through no fault of his own, a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing, whilst he may incur no personal liability, he is under a legal duty to assist the person who had been wronged by giving him full information and in making disclosure of the identity of the wrongdoers. Further, the court stated that a *Norwich Pharmacal* order being an equitable remedy will not be granted as of right even when the requirements for it were satisfied and the court has discretion as to whether to grant or refuse it. (See *Janab's Key To Civil Procedure*, 5th edn, pp. 209 and 210).

[16] An application under O. 24 r. 7A has many riders in addition to what needs to be satisfied under the *Norwich* principle. In addition, the right of discovery under the Rules cannot be equated to a procedural right. It still will fall under the *Norwich Pharmacal* order which is stated as an equitable remedy. Being an equitable remedy, it will not be granted as of right. It is trite that those who seek equitable remedy is required to come with clean hands. If there is an alternative remedy available that must be resorted or if an action can be filed without pre-action discovery, it ought to be filed and subsequently discovery orders should be obtained through normal process. Courts, through their judgment should not open the door to pre-action discovery when identifiable cause of action has arisen. For example, (a) if the claim is for contractual breach; or (b) for a tort like normal road accident cases – an action ought to be filed first and thereafter discovery order should be sought. In such cases, it will be an abuse of process to approach the court by pre-action discovery application.

[17] In this respect, O. 25 r. 7A(5) must be strictly construed by court to ensure the equitable remedy is not abused. In addition, there must be real material before the court to grant the order. It cannot be based on evidence lacking credibility or surmise or conjecture, etc. Order 24 r. 7A(5) reads as follows:

> (5) An order for the discovery of documents before the commencement of proceedings or for the discovery of documents by a person who is not a party to the proceedings may be made by the Court for the purpose of or with a view to identifying possible parties to any proceedings in such circumstances where the Court thinks it just to make such an order, and on such terms as it thinks just.

[18] It must be noted that O. 24 is 'fact centric'. Pure reliance of cases within and outside the jurisdiction as a general rule will not tie the hands of the court in the exercise of its discretionary powers. The test whether or not to grant an order is set out in O. 24 r. 8 itself which reads as follows:

> **Discovery to be ordered only if necessary (O. 24 r. 8)**
>
> 8. On the hearing of an application for an order under rule 3, 7 or 7A, the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.

[19] In essence, the court is not required to lean towards the applicant unless the applicant has made out a strong case for the equitable relief to be granted and the respondent has not been able to credibly deny the applicant's assertion or satisfy the court that alternative relief is or are open to the applicant. Having examined further s. 105 and the Fourth Schedule to the SMA 2013, we are in agreement with the appellants that the respondent's concerns and complaints ought to be addressed in that forum.

[20] We have read the appeal records and considered the able submissions of the parties. We took the view that the appeal must be allowed *in limine*. Our reasons *inter alia* are as follows:

(a) In the instant case, there is alternative action available to the respondents.

(b) It will be an abuse of process for the respondents on the factual matrix of the instant case to seek for a pre-action discovery order.

(c) In the anchor case relied on by the parties, namely the case of *Infoline Sdn Bhd v. Benjamin Lim Keong Hoe* [2017] 8 CLJ 554; [2017] 4 MLRA 203, Her Ladyship Justice Mary Lim had considered the following cases: *Ahmad Zahri Mirza v. Pricewaterhouse Coopers Capital Sdn Bhd & Ors*

[2015] 7 CLJ 930; [2016] 1 MLRH 193 (refd); *Anglo Irish Bank Corporation plc v. West LB AG* [2009] EWHC 207 (refd); *Avanes v. Marshall & Ors* [2007] NSWSC 191 (refd); *Bayerische Hypo-und Vereinsbank AG v. Asia Pacific Breweries (Singapore) Pte Ltd* [2004] 4 SLR (R) 39 (refd); *Beckkett Pte Ltd v. Deutsche Bank AG Singapore Branch* [2003] 1 SLR (R) 321 (refd); *Breakspear & Others v. Ackland & Another* [2009] Ch 32 (refd); *Ching Mun Fong v. Standard Chartered Bank* [2012] 2 SLR 22 (refd); *Clarke v. Earl of Ormonde* [1821] Jac 108 (refd); *Dorsey James Michael v. World Sport Group Pte Ltd* [2014] 2 SLR 208 (refd); *Dunning v. Board of Governors of the United Liverpool Hospitals* [1973] 2 All ER 454 (refd); *Faber Merlin Malaysia Bhd v. Ban Guan Sdn Bhd* [1980] 1 LNS 189; [1980] 1 MLRA 341 (refd); *Hartigan Nominees Ptv Ltd v. Rydge* [1992] 29 NSWLR 405 (dist); *Kneale v. Barclays Bank plc (trading as Barclaycard)* [2010] EWHC 207 (refd); *Kuah Kok Kim v. Ernst & Young (a firm)* [1996] 3 SLR (R) 485 (refd); *Marius Schreuders v. Grandiflora Nominees Pty Ltd* [2014] VSC 310 (dist); *Millar & Another v. Hornsby & Others* [2000] 3 ITELR 81 (dist); *Ng Giok Oh v. Sajjad Akhtar* [2003] I SLR (R) 375 (refd); *Norwich Pharmacol Co v. Customs & Excise Commissioners* [1974] AC 133 (refd); *O'Rourke v. Darbishire & Others* [1920] AC 581 (dist); *Re Cowin v. Gravett* [1886] 33 Ch 179 (dist); *Re Londonderry's Settlement* [1964] 3 All ER 855 (dist); *Re the Internine Trust and the Intertraders Trust; Sheikh Abdullah Ali M Alhamrani v. Russa Management Ltd & Others* [2004] JCA 158 (dist); *Re Tillot, Lee v. Wilson* [1892] 1 Ch 86 (dist); *Rouse & Others v. IOOF Australia Trustees Limited* [1999] 2 ITELR 289 (dist); *Sandra Stuart Curven & Ors v. Vanbreck Pty Ltd (as Trustee for the WS and NR Harvey Family Trust)* [2009] VSC A 284 (dist); *Schmidt v. Rosewood Trust Ltd* [2003] 2 AC 709 (dist). We also had the benefit of looking at the facts of those cases. Those cases relate to cause of action other than contract namely, tort, succession, transfer of shares, etc. In the instant case, the court had failed to consider the salient object and legal history related to pre-action discovery order under O. 24 r. 7A which is a new invent of the Rules of Court introduced in the year 2012, substantially based on the jurisprudence advocated in the *Norwich*'s case and many other cases inclusive of cases in Malaysia. In almost all of these cases, the golden thread was that the application was made against third parties and not contracting parties or parties who have contractual nexus by contract or statute.

(d) In addition, the learned trial judge had failed to consider the test provided in O. 24 r. 8 in the proper perspective, taking into consideration the factual matrix of the case and statutory law as a whole, thereby compromising the integrity of the decision-making process.

A (e) Once the integrity of decision-making process is compromised, the appellate court has no option but to intervene in the discretionary power of the trial court to make just orders as the case warrants.

[21] For reasons stated above, the appeal was allowed with costs of RM10,000 subject to allocatur and set aside the order of High Court and deposit to be refunded.

We hereby ordered so.